Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the matter of | ) | |
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| SOUTHWESTERN BELL MOBILE SYSTEMS, INC. | ) | |
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| Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments | ) | DA No. 97-2464 |

To: The Commission

## COMMENTS OF CENTURY CELLUNET, INC.

Century Cellunet, Inc. ("Century") hereby submits comments supporting the Petition for a Declaratory Ruling ("Petition") filed by Southwestern Bell Mobile Systems, Inc. ("SBMS") regarding the just and reasonable nature of rates charged by CMRS providers and the lawfulness of state court actions challenging such rates.[1] As detailed herein, Century fully agrees with SBMS and urges the Commission to find that billing for CMRS calls in whole-minute increments, as well as charging for incoming calls, are neither unjust nor unreasonable under Section 201 of the Communications Act. Further, Century agrees that state court actions challenging CMRS rates are barred by Section 332(c)(3). Such findings by the Commission will

[1] *See* Wireless Telecommunications Bureau Seeks Comment on a Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Public Notice*, DA 97-2464 (rel. Nov. 24, 1997).

preserve the ability of CMRS providers "to adapt their services to meet customer demands,"[2] thereby advancing the Commission's "continuing effort to enhance competition among mobile service providers . . . and ensure that consumer demand, not regulatory decree, dictates the course of the mobile services marketplace."[3]

## I. Charging for Calls in Whole-Minute Increments and for Incoming Calls Are Common Industry Practices That Are Not Unjust or Unreasonable

As the Commission has previously recognized, competition in the CMRS market "exists already."[4] Thus, in assessing whether CMRS rates are reasonable under Section 201, the Commission has defined the standard "in terms of rates that reflect or emulate competitive market operations."[5] This approach is grounded in the idea that "[c]ompanies subject to competition are forced to operate in ways that generally result in just, reasonable, and non-discriminatory rates."[6]

That is the case here. As SBMS points out in its Petition, whole-minute charging and billing for incoming calls are extremely common practices throughout the CMRS industry.[7] These rate mechanisms are prevalent because they represent a reasonable means for CMRS

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[2] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7988, 8010 (1994) (*Third CMRS Report and Order*).

[3] *Id.* at 7992.

[4] Applications of Pittencrieff Communications, Inc. and Nextel Communications, Inc., CWD No. 97-22, *Memorandum Opinion and Order*, DA 97-2260, at ¶ 19 (rel. Oct. 24, 1997).

[5] *Petition of New York State Public Service. Commission to Extend Rate Regulation*, 10 FCC Rcd 8187, 8190 (1995).

[6] *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, 2886 (1989).

[7] *See* SBMS Petition at 11.

carriers to recover the costs associated with the use of their systems.[8] Significantly, both the FCC and various state commissions have, in the past, repeatedly accepted whole-minute charging and billing for incoming calls through their allowance of tariffs describing these CMRS rate practices.[9] The FCC has even previously rejected efforts to require per-second billing increments in lieu of per-minute increments in the long distance context, stating that the per-minute billing practice was permissible.[10]

Moreover, contrary to being unjust or unreasonable, the rate flexibility embodied in the subject billing practices serves to promote competition – thus, further strengthening the competitive check on any rate mechanisms used. The Commission has observed that "carriers compete in terms of their billing practices, and customers are free to select a carrier that offers the most desirable billing options."[11] As illustrated in the SBMS Petition, carriers offer a wide variety of rate plans to customers from which to choose.[12] Yet, if the "Commission were to mandate a particular billing procedure, it would eliminate this form of service competition."[13]

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[8] Charging in whole minute increments is an equitable and practical way for carriers to recover the costs of a call. Charging for incoming calls is also appropriate, given the network and switching costs associated with terminating a call on the CMRS network.

[9] *See* SBMS Petition at 10.

[10] *See* Letter from Kathleen B. Levitz, Acting Chief, Common Carrier Bureau, to Donald L. Pevsner, Esq. (dated Dec. 2, 1993) ("Levitz Letter").

[11] *Id.* at 2.

[12] *See* SBMS Petition at 17. Competition has led to a variety of CMRS pricing plans, including "calling party pays" and "free first minute" service options.

[13] Levitz Letter at 2.

Clearly, any action that inhibits the ability of carriers to compete would not yield more reasonable rates, but rather just the opposite.

Finally, as pointed out by SBMS, other rate plans are not necessarily going to be more "just" or "reasonable." The Commission itself has concluded that requiring interexchange carriers to bill on a per-second basis "appear[ed] unlikely to benefit consumers."[14] This conclusion flows from the fact that CMRS providers, like all businesses operating in an open market, must recover their costs. Section 201 recognizes and authorizes this reality.[15] Accordingly, any rates charged by CMRS providers will appropriately and necessarily be structured to recoup their costs in offering service.[16] As such, requiring carriers to charge on a per-second basis or to permit free incoming calls would require a reformulation of the overall rate structure so as still to permit recovery of costs. In the end, as the Commission concluded, "it is unlikely" that such changes "will reduce consumer phone bills."[17]

## II. Section 332(c)(3) Prohibits State Regulation of CMRS Rates, Including Regulation Through State Court Actions

Section 332(c)(3) establishes clear boundaries limiting the extent of state authority over CMRS services. The statute unambiguously mandates that "no State . . . shall have any authority

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[14] *Id.* at 1.

[15] *See United States Transmission Systems, Inc.*, 66 F.C.C.2d 1091, 1092 (1977) (describing the reasonableness of a rate structure as one that "is reasonably related to the cost of providing service").

[16] For this reason, Century joins SBMS in urging the Commission to define "call initiation" to mean customer activation of the customer's phone by pressing a "SEND" button. It is at this point that the CMRS provider begins to incur costs. *See* SBMS Petition at 11-12.

[17] Levitz Letter at 1.

to regulate . . . the rates charged by any commercial mobile service."[18] This clear limitation on the scope of state regulation was recognized by the Commission when it stated that Section 332 "intended generally to preempt state and local rate . . . regulation of all commercial mobile radio services."[19] The courts have also endorsed this interpretation.[20]

This clear curtailment of state authority over CMRS rates also extends to the types of state court actions at issue in SBMS' Petition. As an initial matter, "[i]t is undisputed that[,] like legislative or administrative action, judicial action constitutes a form of state regulation."[21] And, even though the state court claims at issue come in many guises and many forms (contract, tort, equity), the style of the suit and the relief sought indicate that their unambiguous effect is the regulation of CMRS rates.[22] Further, inasmuch as these suits are styled as class actions, the

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[18] 47 U.S.C. § 332(c)(3)(A). SBMS requests the Commission to declare that the term "rates charged" in Section 332 includes: (a) which services the carrier charges for and (b) how much a carrier decides to charge for those services. Century agrees. These two elements make up the very core of what is meant by the term "rates charged." Indeed, Black's Law Dictionary defines the term "rate" in the context of public utilities to include "[t]he unit cost of a service supplied to the public." Black's Law Dictionary 871 (6th ed. 1991). Inured in this definition is the choice of the service and how that service will be charged.

[19] *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1504 (1994) (*Second CMRS Report and Order*); *see also Petition of New York State PSC*, 10 FCC Rcd at 8190 (Section 332(c) "express[es] an unambiguous congressional intent to foreclose state regulation" over CMRS rates.).

[20] *See, e.g. Connecticut Dep't of Pub. Util. Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996) ("Congress provided a general preemption of state rate regulation for . . . CMRS" through Section 332(c).).

[21] *Comcast Cellular Telecom. Litig.*, 949 F. Supp. 1193, 1201 n.2 (E.D. Pa. 1996).

[22] *See id.* at 1201 (The remedies "demonstrate that the true gravamen behind . . . [the plaintiff's] allegations is a challenge to . . . [the carrier's] rates and the way in which they are applied.").

court's decision affects not only the named plaintiff, but the entire class of consumers defined by the action. This establishes, in essence, the "rate charged" for that entire class of consumers.[23]

Moreover, in order to grant the relief sought in these suits, the state court is required to engage in its own impermissible rate regulation. Indeed, a request for injunctive relief in this area "is nothing less than a request that the court regulate the manner in which [a carrier] calculate its rate schedules."[24] Before an injunction can be issued, the court must determine whether the particular rate practice is reasonable. This is rate regulation.[25] A request for money damages is no different. In order to make an award of damages, a court must first determine what the proper rate should have been.[26] For these reasons, the state court actions referenced in SBMS's Petition clearly constitute state regulation of the "rates charged" by CMRS carriers and are thus preempted by Section 332(c)(3).[27]

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[23] As SBMS notes, individual actions would have the same effects by setting a precedent that others could follow, in essence, setting rates for all consumers. SBMS Petition at 18 n.33.

[24] *Comcast Litig.*, 949 F. Supp. at 1201.

[25] *Cf. Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (finding that a judicial determination of the reasonableness of rates is rate regulation).

[26] *See* SBMS Petition at 22 n.39 (listing citations); *Arkansas Louisiana Gas Co.*, 453 U.S. at 579 (finding that an award of damages is "nothing less than the award of a retroactive rate" change).

[27] In addition, several courts have recognized that the Commission, not the courts, enjoys "primary jurisdiction" in deciding whether rates are reasonable. *See, e.g., IPCO Safety Corp. v. WorldCom, Inc.*, 944 F. Supp. 352, 357 (D.N.J. 1996) ("[T]he FCC has expertise and primary jurisdiction" to decide rate issues.); *American Tel. & Tel. Co. v. IMR Capital Corp.*, 888 F. Supp. 221, 245 (D. Mass. 1995) ("It is obvious that the FCC, and not this Court, is the body with both the expertise and Congressional mandate to accomplish this task [of deciding rate issues].").

## III. Failure To Preempt State Court Actions Regarding CMRS Rates Would Shatter the Regulatory Framework Established by Congress To Govern the Regulation of CMRS Providers

CMRS services have long been viewed as inherently, and thus jurisdictionally, interstate. As emphasized by Congress, "mobile services . . . , by their nature, operate without regard to state lines."[28] By enacting Section 332(c)(3), Congress made clear its intent to establish "uniform rules to govern the offering of all commercial mobile services"[29] and specifically to avoid a patchwork of different and inconsistent state regulatory requirements. Congress was concerned that disparities in regulatory schemes "could impede the continued growth and development of commercial mobile services."[30]

In this case, failure by the Commission to preempt the state court actions of which SBMS complains would be wholly inconsistent with Congress' clearly articulated goal of a uniform, federal framework to govern the regulation of CMRS providers. As the SBMS Petition explains, suits challenging CMRS rates are just beginning to proliferate.[31] If this trend continues, CMRS carriers could be faced with 50 different court orders prescribing what services they will be allowed to charge for and how each service will be priced. Participating in these myriad proceedings will also needlessly drain carriers' resources and divert investments from system improvements and other benefits to consumers. It was precisely to avoid this result that

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[28] H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587 (House Report).

[29] *Id.* at 259, 1993 U.S.C.C.A.N. at 586.

[30] *Id.* at 260, 1993 U.S.C.C.A.N. at 587.

[31] *See* SBMS Petition at 2 n.1.

Congress enacted its amendments to Section 332. Accordingly, to ensure consistency with Congressional goals, the Commission must preempt these state court challenges to CMRS rates.

## IV. Conclusion

For the foregoing reasons, Century strongly supports SBMS' request for a declaratory ruling regarding the just and reasonable nature of rates charged by CMRS providers and the preemption of state court actions challenging such rates. Century fully concurs with SBMS' request that the Commission find that charging for calls in whole minute increments and for incoming calls are just and reasonable rate practices under Section 201 of the Communications Act. Century also agrees with SBMS, and urges the Commission to find, that state court actions challenging these rate practices constitute state regulation of CMRS rates and are, accordingly, barred by Section 332(c)(3) and the regulatory framework Congress designed to govern CMRS.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 1998, I caused copies of the foregoing Comments of Century Cellunet, Inc. to be mailed via first-class postage prepaid mail to the following:

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